No. 11,714

In the

nited States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BILLY BERNARD BLEDSOE,

Appellant,

v.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz Island, California,

Appellee.

BRIEF FOR APPELLANT

BILLY BERNARD BLEDSOE,
Appellant pro. se.

SUBJECT INDEX

No. 11,714

In the

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BILLY BERNARD BLEDSOE,

Appellant,

v.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz Island, California,

Appellee.

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from an order denying appellant's Petition for Writ of Habeas Corpus No. 27412-R, filed in the Southern Division of the United States District Court for the Northern District of California.

The court below assumed jurisdiction because that court does have jurisdiction of habeas corpus proceedings, and the appellant, the appellee, James A. Johnston, Warden, as well as the United States Penitentiary, Alcatraz Island, California, were each and all situated and located within and subject to the jurisdiction of the said court.

Jurisdiction of the court is invoked under 28 U. S. Sec. 225,—the notice of appeal having been filed on July 31, 1947, within three months from entry of the order denying appellant's petition for writ of habeas corpus. Through the power conferred upon the respondent herein by Section 716b of Title 18 U. S. C. A., the appellant has been released from the close confinement of the penitentiary, but he is still within and subject to the custody of the respondent herein. That is to say:

> "While on parole the convict is bound to remain in the legal custody and under the control of the warden until the expiration of the term. * * * While this is an amelioration of punishment, it is in legal effect imprisonment." *(Anderson, Warden v. Carroll, 263 U. S. 193.)*

The important fact to be observed in the record to the mode of procedure upon this writ is, that it is directed to, and served upon, not the appellant, but the respondent.

See also, *Ex Parte Mitsuye-Endo, S. Ct. 208, U. S. ex rel Nikolson v. Dillard, C. C. A., Va., 1939, 102 F. (2d) 94; Ex Parte Catanzaro, 138 F. (2d) 100-101* [*3, 4*]*; Fiswick v. United States, 67 S. Ct. 224.*

REQUEST FOR JUDICIAL NOTICE OF THIS COURT'S RECORDS

The appellant herein, requests this court to take judicial notice of its own printed records in *Bledsoe v. Johnston, No. 11,163.* This appellant will refer to parts of the said record and note it as (Tr. R. No. 11,163, p. ....). The present transcript of record will be referred to and noted as

(Tr. R. No...., p.....). Both of the above mentioned records are of the same person and the same original case.

STATEMENT OF THE CASE

The appellant was an inmate of the United States Penitentiary of Alcatraz Island, California. He is serving terms under two judgments, commitments and sentences, all of which were issued out of and under the seal of the District Court of the United States for the Eastern District, Paris Division, State of Texas, on the 11th day of December, 1939, in Actions No. 1335 and No. 1166, in the said United States District Court. (Tr. R. No. 11,163, pp. 13, 19.) The appellant pled guilty in each of these actions, to alleged violation of the United States Code, Title 18, Section 315.

The appellant filed a petition for a writ of habeas corpus in the United States District Court, for the Northern District of California, on the 25th day of September, 1944, and the disposition of that petition was by memorandum and an order by Judge A. F. St. Sure (Tr. R. 11,163, p. 24) that said memorandum and order in that action ordered the appellant returned to the United States District Court for the Eastern District of Texas, at Paris, Texas, for further proceedings.

In line with the above mentioned order by Judge A. F. St. Sure, the appellant was returned to the Texas court, and on the 29th day of January, 1945, a proceeding was held (Tr. R. 11,163, p. 33), and appellant was returned to

Alcatraz and on the 6th day of February, 1945, the Texas court entered two new or alleged corrected judgments (Tr. R. No. 11,163, pp. 45, 49), as a result of the above mentioned proceedings.

The appellant, in April, 1945, filed a second petition for writ of habeas corpus (Tr. R. No. 11,163, p. 2), seeking his release from prison. The respondent filed a motion to dismiss. (Tr. R. 11,163, p. 54.) On July 20, 1945, the Honorable Judge St. Sure entered a memorandum and order granting motion to dismiss. (Tr. R. No. 11,163, p. 54.) The appellant appealed to this Honorable Court and on March 20, 1946, an opinion was filed affirming this said memorandum and order granting motion to dismiss (Tr. R. No. 11,163), *Bledsoe v. Johnston, 154 F. (2d) 458.* The appellant petitioned the United States Supreme Court for a writ of certiorari, said petition was denied June 10, 1946.

The appellant in this present petition does not attack the right of the Texas court to correct its records, but contends and shows, that due to the correction, that his sentence was increased by a term of five (5) years, contrary to the law and outstanding authorities of the United States courts.

To properly understand appellant's position, the original judgments issued December 11, 1939, and the corrected judgments issued February 6, 1945, are hereinafter set out in part.

The original judgment in Case No. 1335, issued December 11, 1939, and signed by the sentencing judge, read in part (Tr. R. No. 11,163, p. 13):

> "For the period of five (5) years, said sentence to run consecutive with sentence of five (5) years this day imposed in Case No. 1166, of the Texarkana Division."

In Case No. 1166, as evidenced by the signed judgment of the court (Tr. R. No. 11,163, p. 21), the trial judge sentenced the appellant as follows:

> "For a period of five (5) years, said sentence to run consecutive with sentence of five (5) years this day imposed in Case No. 1335, of the Jefferson Division."

After the proceedings held on the 29th day of January, 1945, in the Texas court, and on February 6, 1945, the Texas court entered two new judgments. In Action No. 1335, the courts corrected the judgment previously entered on December 11, 1939, to read in effect that this appellant was sentenced to imprisonment for five (5) years and fined One Hundred ($100.00) Dollars. This corrected judgment differed from the original judgment in that it failed to state in any way when it was to start or how it was to run with or to the judgment in Case No. 1166. (Tr. R. No. 11,163, p. 52.)

In Action No. 1166, the judgment previously entered on December 11, 1939, was corrected to read:

> "It is further ordered that the sentence imposed in this shall run consecutive to the sentence this day imposed against this defendant in Criminal No. 1335, of the Jefferson Division; that is, the service of the sen-

tence in this case by the defendant shall begin at the expiration of the service of the sentence imposed in Criminal No. 1335, of the Jefferson Division." (Tr. R. No. 11,163, p. 48.)

The appellant contends that, the latter judgments issued February 6, 1945, compared to the original judgments issued December 11, 1939, definitely show an increase of sentence by a term of five (5) years, contrary to the law and outstanding authorities of the United States courts.

At the time of the filing of this present petition, the appellant was within the actual prison walls of Alcatraz. On September 10, 1947 this appellant was released under the Conditional Release Law, Title 18, U. S. C. A., Sec. 716b. Upon the release of this appellant under the above cited statute the respondent herein forced the appellant to return to the Eastern District of Texas. Under this Conditional Release Law the appellant still remains in the custody of the respondent, James A. Johnston, until the expiration of the sentence he was committed to serve, to-wit: December 10, 1947.

ARGUMENT

1. The original judgments and sentences in Action No. 1166 and in Action No. 1335, issued December 11, 1939, were concurrent sentences.

To show an increase of sentence, the appellant must first show that the original judgments issued on December 11, 1939 (Tr. R. No. 11,163, pp. 13, 21), heretofore set out in part were concurrent sentences, and he contends that the

following cases definitely support the correctness of this contention. See the following cases:

Aderhold v. McCarthy, 65 F. (2d) 452;
Biddle, Warden, etc. v. Hall, 15 F. (2d) 840;
Bledsoe v. Johnston, 154 F. (2d) 458;
Downey v. United States, 91 F. (2d) 223;
Ex Parte Gafford, 83 Am. St. Rep. 568, 12 L. R. A. (U. S.) 124;
In re Breton, 79 Am. St. Rep. 335;
In re Fegler (No. 25741), 36 Fed. Supp. 88;
Puccinelli v. United States (9th Cir.), 5 F. (2d) 6;
United States v. Patterson, 29 F. 775;
U. S. ex rel Chasteen v. Denmark, 138 F. (2d) 289.

In *Chasteen v. Denmark, supra,* it is said:

> "It is true that where a defendant is sentenced upon different indictments, the correct method of entering judgment is not for the total time in gross, but for a specified time under each indictment, that time under the second to commence when the first ends. (Cases cited.) But the judgment entered in a case of cumulative punishment must be of such certainty that the commencement of the second and the termination of the first sentence may be seen from the record."

In the same case, at page 290, the court, speaking of sentences in a criminal case held:

> "A sentence in a criminal case should be clear and definite, Hode v. Sanford, 5 Cir., 101 F. (2d) 290, and be so complete as to need no construction of a court to ascertain its import. It should be so complete that to ascertain its meaning it will not be necessary to supplement the written words by either a nonjudicial or a ministerial officer. He must find what the

sentencing judge intended from the language which he used."

In the case of *Bledsoe v. Johnston, 154 F. (2d) 458*, it is said by Judge Denman, speaking of the original judgment in this case:

> "The controversy here is whether the sentences were to be served concurrently or consecutively. Each sentence signed by the district judge read that it is "to run consecutive with" the other. Obviously, here is no effective judgment for consecutive sentences."

Quoting further from the *Bledsoe case* it is said:

> "In the absence of a judgment for consecutive sentence on separate indictments, 18 U. S. C. A. Sec. 709 (a) provides that each sentence shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence; provided, that if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term."

Judge Denman further said:

> "If nothing else were before the court, both sentences were served on December 11, 1944, that is, five years after the imprisonment began in jail, awaiting transportation to the penitentiary."

He, Judge Denman, was speaking here of the corrected judgments, that is, if they were not before the court. But these same judgments were entered several months after the date Judge Denman said appellant had served his sentence to-wit: February 6, 1945.

The marshals' return in each of the original judgments, No. 1166 and No. 1335 (Tr. R. No. 11,163, pp. 14, 23) show that appellant was committed on the same day, and to begin service upon both judgments upon that date.

The appellant earnestly believes that he has shown these judgments and sentences constituted concurrent sentences, valid for a term of five (5) years. These written and signed judgments are the true sentence of the court—see Rule 1 of the Rules of Criminal Procedure, After Plea of Guilty, Verdict or Finding of Guilt. This Rule 1 makes it mandatory for a written and signed judgment by providing in part:

> "The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk."

In further support of this Rule 1 see also *Miller v. Sanford, 161 F. (2d) 291.*

The court below in the order denying appellant's petition for writ of habeas corpus (Tr. R. No. . ., p. . .), relied upon *Bledsoe v. Johnston, 154 F. (2d) 458*, and to support that line of action cited *Swihart v. Johnston (C. C. A. 9), 150 F. (2d) 721.* In *Bledsoe v. Johnston, supra*, it is stated that:

> "The sentencing court has the power so to correct the judgments after the term of the longest sentence has been served if the correction be based upon entries on the rough docket of the court." Citing *Puccinelli v. United States, 5 F. (2d) 6, 7; United States v. Patterson, 29 F. 775, 779.*

The appellant has no quarrel with the right of the Texas court to correct its records to speak the truth. Nor does he

have any quarrel with the authorities cited, but the *Puccinelli v. United States, supra,* was decided April 27, 1925, and the *United States v. Patterson, supra,* was decided January 31, 1887. At the time of these decisions there was no requirement for a written and signed judgment. Without a written and signed judgment, it is quite natural and reasonable that for a court to correct its sentences, it would, in fact, be forced to base the correction upon the entries on the rough docket of the court, and notes taken by the clerk. Long after the *Patterson* and *Puccinelli cases*, the heretofore cited Rule 1 was adapted and came into effect September 1, 1934, requiring and making mandatory a written and signed judgment. A written and signed judgment is a judicial act and is the truth itself and is controlling.

In the order denying appellant's petition for a writ of habeas corpus, the court below said:

> "The grounds alleged in this instant petition are the same as those heretofore alleged in petitioner's prior application, and although res judicata does not apply in habeas corpus proceedings, a prior refusal to discharge on a like application may be considered and given controlling weight. Swihart v. Johnston (C. C. A. 9), 150 F. (2d) 721."

The appellant is familiar with the *Swihart case* but does not deem it necessary to argue it here, as this present court modified its own opinion, in the *Swihart case*, later in the case, *Kerr v. Squire, 151 F. (2d) 308, 310.*

In the *Kerr v. Squire, supra,* following the rule in the case of *Waley v. Johnston, 316 U. S. 101,* Judge Denman said:

> "The adjudication of a prior petition for release from imprisonment for the same crime, does not make

> res judicata any matters there decided, much less make adjudicated all the rights to release which could have been but were not presented in that prior petition. Waley v. Johnston, 316 U. S. 101."

In *Bledsoe v. Johnston, supra,* there is no ruling as to whether the correction constituted an increase of sentence by five (5) years. It only rules that a court can correct its records. The contention raised by appellant here has not been adjudicated, and appellant respectfully urges this Honorable Court to rule upon the contention.

2. The judgments and sentences entered February 6, 1945 constitute an increase of sentence contrary to law.

The appellant contends that he has shown without a doubt, by law and authorities cited heretofore, that the original judgments issued December 11, 1939, were concurrent and valid sentences for a term of five (5) years. There certainly cannot be a doubt about appellant now being held for a term of ten (10) years on the authority of the judgments issued February 6, 1945. This five (5) year increase of sentence is contrary to all law that appellant has been able to find.

The appellant relies strongly upon the case of *Rutledge v. United States, 146 F. (2d) 199,* quoting from the *Rutledge case* at page 200, Circuit Court Judge Holmes said:

> "The attempted correction of the second sentence to provide that it should begin upon the expiration of the first sentence increased by two years the period of penitentiary service imposed upon appellant. The Federal courts have no power to increase a sentence fixed by a valid judgment." *Ex Parte Lange, 18 Wall. 163, 21 L. Ed. 872; United States v. Mayer, 235 U. S. 55,*

35 S. Ct. 16, 59 L. Ed. 129; Ex Parte United States, 242 U. S. 27, 37 S. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178 Ann. Cas. 1917B, 335; United States v. Benz, 282 U. S. 304, 51 S. Ct. 113, 75 L. Ed. 354; Roberts v. United States, 5 Cir., 131 F. (2d) 392.

See also,

> "It seems to be well established that a trial court is without power to set aside a sentence after a defendant has been committed thereunder, and impose a new or different sentence, increasing the punishment, even at the same time at which the original sentence was imposed. A judgment which attempts to do so is void and the original judgment remains in force." (*44 A. L. R. 1203*, and cases cited.)

And

> "A sentence which has been partly executed cannot be set aside or changed by the trial court so as to increase the punishment after the end of the term of court at which it was rendered." (*44 A. L. R. 1204* and cases cited.)

Under the law, as heretofore cited, the judgments and sentences entered February 6, 1945, are void; and the first judgments issued December 11, 1939, are in full force and effect, and are valid sentences for a term of five (5) years and the appellant has executed these concurrent sentences in full.

This appellant was released September 10, 1947, under the Conditional Release Law, Title 18 U. S. C. A., Sec. 716b. Although the appellant is outside the prison walls, this case does not become moot. A prisoner released under the Conditional Release Law is treated as on parole until the expiration of the maximum term. A parole is merely

an extension of the prison walls. As the appellant is now being held for a ten (10) year term, his date of discharge is December 10, 1949.

> "The status of a prisoner while under conditional release is that of a prisoner on parole, and in legal effect is 'imprisonment,' notwithstanding that the punishment is ameliorated. U. S. ex rel Nickolson v. Dillard, C. C. A. Va., 1939, 102 F. (2d) 94."

CONCLUSION

Because, therefore, the sentences originally imposed on this appellant on December 11, 1939, failed to notify this appellant or the warden of the penitentiary in which he was confined, or supplied any means of their knowing which of the two sentences the appellant was serving during the first five (5) years of his imprisonment; because said original sentences failed to specify the order of sequence of said sentences; because a prisoner is entitled to know under which sentence he is imprisoned; because said original judgments, by providing that each sentence was to run "consecutive with" the other is incapable of application; and because those judgments were final, appellant respectfully submits that the judgments created, in legal effect, concurrent sentences, and any reference to "consecutive" sentences therein contained were void as incapable of application.

Because when appellant was originally delivered to both the County jail and the United States penitentiary, he was so delivered to commence serving both sentences as imposed by the two judgments and so committed to serve both sentences on December 11, 1939, and therefore, when appel-

lant filed his first, second and present petition for writ of habeas corpus and when the proceedings to correct the record was held at Paris, Texas, January 29, 1945, the appellant had already completely served both sentences imposed by the original judgments signed by the trial judge on December 11, 1939; because, when the judge at Paris, Texas, entered the judgments of February 6, 1945, he, the trial judge increased the appellant's punishment by five (5) years; and because the trial judge had no power to increase the appellant's punishment, the appellant respectfully submits that the judgments issued February 6, 1945, in the Texas court, are each void and of no legal effect.

For the several and various reasons herein set forth, it is most respectfully submitted that the order appealed from be reversed and appellant ordered discharged from the custody of the appellee.

Dated ~~September~~ OCT. 2, 1947.

Respectfully submitted,

.....

BILLY BERNARD BLEDSOE,
Appellant pro. se.